identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

DATE: MAY 31 2011 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]
ATLANTA, GA 30309

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (Director), denied the employment-based immigrant visa petition. A motion to reopen and reconsider was granted by the Director, but the petition was again denied on the merits. The petition is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is an information technology (IT) consulting company. It seeks to employ the beneficiary permanently in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL), accompanied the petition. In both of his decisions the Director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess a master's degree in information technology or a related field, or a foreign degree equivalent.

On appeal, counsel asserts that the beneficiary's education in India – including a three-year bachelor's degree in statistics, a one-year post-graduate diploma in computer applications, and a two-year master of science degree in information technology – is equivalent to a master's degree in information technology or a related field in the United States.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The record documents that the beneficiary possesses a three-year bachelor of science degree in statistics from the University of Madras in India and a two-year master of science degree in information technology from Bharathidasan University, also in India. On appeal, for the first time in this proceeding, the beneficiary also claims to have a post-graduate diploma from Madras Christian College, in India, for a one-year course of study in computer applications that he completed after his bachelor's degree program and before his master's degree program. The issue on appeal is whether the beneficiary's master of science degree in information technology from Bharathidasan University is equivalent to a U.S. master's degree in information technology or a related field.

Eligibility for the Classification Sought

As noted above, the ETA Form 9089 in this matter is certified by the DOL. The DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available, and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to the DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

> Visas shall next be made available . . . to qualified immigrants who are members of the professions . . . .

In 1990 section 203(b)(2)(A) was added to the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

> Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent . . . .

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244, is identical to the statutory language used subsequent to that decision except for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at 6786 (Oct. 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien "must have a bachelor's degree" when considering equivalency for second preference immigrant visas. We must assume that Congress was aware of the agency's previous treatment of a "bachelor's degree" under the Act when the new classification was enacted and did not intend to alter the agency's interpretation of that term. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). *See also* 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor's degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (INS), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the INS specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree (plus the requisite five years of progressive experience in the specialty). More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 245. Where the analysis of the beneficiary's credentials relies on a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree."[1] In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree (plus the requisite five years of progressive experience in the specialty). 8 C.F.R. § 204.5(k)(2).

For the classification of advanced degree professional the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree" (plus evidence of five years of progressive experience in the specialty). For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." We cannot conclude that the evidence required to demonstrate that an alien is an advanced degree

[1] *Compare* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent degree." (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991). *Cf.* 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of "an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability").

On appeal counsel submits an updated version of the "Evaluation of Academic Credentials" by Morningside Evaluations and Consulting (Morningside), dated April 13, 2009. The updated version, like the original dated January 23, 2009, concludes that the beneficiary's education in India is equivalent of a master's degree in computer science from a U.S. university. Unlike the earlier version, however, the updated evaluation includes a 6th year of study which is completely undocumented in the record. According to Morningside, the beneficiary earned a Post-Graduate Diploma in Computer Applications from Madras Christian College in a one-year course of study that post-dated his three-year bachelor's degree program at Madras University and pre-dated his two-year master's degree program at Bharathidasan University. While the individual courses are listed in the evaluation, there is no corroborating documentation from Madras Christian College. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The AAO also notes that the information about the beneficiary's computer studies at Madras Christian University was newly submitted on appeal. Despite ample opportunity to submit this information and supporting documentation earlier in this proceeding – such as with the original petition, in response to the request for evidence, or with the motion to reopen or reconsider – the petitioner failed to do so. Due to the untimeliness of this submission, and its lack of evidentiary support, the AAO will not consider the information about the applicant's alleged coursework at Madras Christian College in deciding this appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). Thus, the beneficiary has five years of documented education at Indian universities.

In his initial denial of this petition the Director cited information in the Electronic Database for Global Education (EDGE) indicating that a three-year bachelor of science degree from an Indian college or university, followed by a two year master of science degree from an Indian college or university, represents an educational attainment comparable to a bachelor's degree in the United States. [2] The Director concluded that the beneficiary's education in India was equivalent to a U.S. bachelor's degree in computer science.

---

[2] EDGE was created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). AACRAO, according to its website, www.accrao.org, is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration

On appeal counsel reviews the Director's rejection of its original claim – based on Morningside's earlier evaluation – that the beneficiary's three-year bachelor of science degree is the equivalent of three years of undergraduate study in the United States, that the first year of his master's degree program was the equivalent of a fourth year of undergraduate study in the United States (completing the equivalent to a U.S. bachelor's degree), and that the second year of his master's degree program was the equivalent of a one-year master's degree program in the United States. In his Decision on the Motion to Reopen and Reconsider, the Director acknowledged that several U.S. universities offer combined bachelor's and master's degree programs in computer science that can be completed in five years – comprised of a four-year bachelor's degree and a one-year master's degree. He discussed two such programs – at William and Mary University (W&M) and the University of California at San Diego (UCSD) – noting that admission into the accelerated master's program was selective, based on such factors as academic performance at the undergraduate level and completion of some graduate-level courses while an undergraduate, and that the one-year post-graduate program was a rigorous course of study. In comparison with those two programs, the director observed that the master's degree program at Bharathidasan University in India did not appear to have similarly rigorous entry requirements or as intensive and advanced a course of study. The beneficiary completed only three computer courses in his three-year bachelor's degree program, the director pointed out, and none of them appears to have been at the graduate level.

Counsel postulates that the beneficiary might have qualified for the one-year master's degree program in computer science at W&M or UCSD, but fails to demonstrate that the beneficiary's academic record at Madras University – which his transcript shows was characterized by mediocre grades, an overall rating of "Second Class," and a light courseload in the computer field – would have qualified him for such a degree program. Counsel complains that the Director chose two of the most demanding one-year master's programs in the United States, without commenting on other one-year programs. Counsel does not identify any other one-year master's degree programs in computer science that he thinks should be considered in this proceeding. The latest Morningside

---

professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." *Id.*

According to its registration page, EDGE is "a web-based resource for the evaluation of foreign educational credentials" that is continually updated and revised by staff and members of AACRAO. Authors for EDGE are not merely expressing their personal opinions. Rather, authors for EDGE must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials. "An Author's Guide to Creating AACRAO International Publications" 5-6 (First ed. 2005), available for download at www.aacrao.org/publications/guide_to_creating_international_publications.pdf. If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* at 11-12.

evaluation (April 13, 2009) asserts that Devry University offers a one-year master's degree in computer science that does not require a distinguished academic record and is not particularly intensive. Neither Morningside nor counsel offers any documentary evidence in support of this claim. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Soffici.*

Counsel contends that the beneficiary's one-year course of study at Madras Christian College that earned him a Post-Graduate Diploma in Computer Applications should be viewed, together with his three-year bachelor of science degree in statistics from the University of Madras, as supplying the "missing year" to his undergraduate education, thereby giving the beneficiary the U.S. equivalent of a four-year bachelor's degree prior to his two-year master of science program at Bharathidasan University. As previously discussed, however, the Post-Graduate Diploma in Computer Applications claimed by the beneficiary is undocumented in the record and will not be taken into consideration by the AAO in adjudicating this appeal.

In accordance with the foregoing analysis, the AAO agrees with the Director that the beneficiary's education in India is equivalent to bachelor's degree in the United States, not a master's degree. Furthermore, the beneficiary did not have five years or more of progressive experience in the field of information technology, or computer science, at the time the DOL certified the labor certification application (February 23, 2007), since little more than two years had elapsed since the beneficiary earned his information technology degree in November 2004. Accordingly, the beneficiary has neither (1) a U.S. master's degree or foreign equivalent degree in information technology or a related field, nor (2) a U.S. bachelor's degree or foreign equivalent degree plus five or more years of progressive experience in the specialty, as required under 8 C.F.R. § 204.5(k)(2) to qualify for preference visa classification as an "advanced degree professional" under section 203(b)(2) of the Act.

Qualifications for the Job Offered

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.,* 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu,* 736 F. 2d at 1309.

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In this matter, Part H, lines 4 and 7, of the labor certification state that a master's degree in information technology, computer science, or a related field is the minimum level of education required for the position of software engineer. Line 8 states that no combination of education or experience is acceptable in the alternative. Line 9 states that a foreign educational equivalent is acceptable.

As previously discussed, the beneficiary does not have a U.S. master's degree, or a foreign educational equivalent, in the field(s) indicated. The beneficiary also does not have five years of progressive experience after earning his U.S.-equivalent bachelor's degree at Bharathidasan University, as required to constitute a U.S.-equivalent master's degree under 8 C.F.R. § 204.5(k)(2). Thus, the beneficiary does not qualify for the proffered position.

Conclusion

The beneficiary does not have an advanced degree or a foreign equivalent degree, and therefore does not qualify for preference visa classification under section 203(b)(2) of the Act. In addition, the beneficiary does not meet the job requirements on the labor certification. For these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. *See* Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.